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No. 82-1449

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

JAMES CATTELL,

Petitioner,

v.

ELIZABETH BARRETT,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Second Circuit properly held that there were disputed issues of fact with respect to Petitioner James Cattell's statute of limitations defense which precluded summary judgment for the defendant?

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Respondent submits this brief in opposition to James Cattell's Petition for a writ of certiorari. Respondent opposes the petition, which at best is premature because discovery has not been completed and the case has yet to go to trial.

STATEMENT OF THE CASE

This Petition arises from the death of Harold Blauer in 1953. The facts should shock the conscience of this Court. Mr. Blauer, who was admitted to the New York State Psychiatric Institute in 1952, was turned into a human guinea pig upon whom the Army Medical Corps performed experiments, without his consent, by injecting him with synthetic mescaline derivatives. Mr. Blauer was

killed by the fifth such injection. Thereafter, the governments of the United States and of the State of New York engaged in a concerted effort to conceal the full facts underlying Mr. Blauer's death. Finally, in 1975, the Secretary of the Army began to disclose this astounding episode.

Following the Army's 1975 disclosures, Elizabeth Barrett, one of Mr. Blauer's daughters, began these actions on behalf of Mr. Blauer's heirs and estate. Ms. Barrett asserts two essential claims. First, she seeks recovery against the United States under the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.*, for negligent initiation, implementation and administration of the secret chemical experimentation program that cost Mr. Blauer his life. Second, Ms. Barrett seeks recovery under 42 U.S.C. § 1983 and *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against the individuals who on behalf of the United States and the State of New York conspired to withhold or cover up the full and true circumstances surrounding Mr. Blauer's death. Ms. Barrett contends this resulted in the deprivation, without due process, of the full value of the causes of action relating to Mr. Blauer's death.

The defendants, including the petitioner here, moved to dismiss, *inter alia*, on the ground that the statute of limitations barred the lawsuit. Ms. Barrett argued that defendants' concealment of material facts tolled the running of the statute of limitations until 1975, when the Army's disclosure of certain of these events suggested the real circumstances of his death. The Second Circuit agreed with Barrett, holding that under the so-called "diligence-discovery" rule (a defendant's deliberate concealment of the material facts tolls the running of the statute of limitations until the plaintiff knows or should

have known of the basis for the lawsuit), Barrett had presented facts and allegations sufficient to preclude the entry of summary judgment in favor of the defendants.

In particular, some of the facts suggesting fraudulent concealment which the Second Circuit found were sufficient to make out a triable issue of fact on that question included:

—the Army took steps which left "the deliberate false impression that the drug used on Blauer was for therapeutic purposes," when Ms. Barrett's experts concluded that the sole purpose of the injections was human experimentation;

—the medical reports which followed Blauer's death "led to the further misimpression that a heart condition was at least partly responsible for Blauer's demise" when Ms. Barrett's experts concluded that the true cause of death was "poisoning by the injected drug";

—the defendants, following commencement of a wrongful death action by Mr. Blauer's estate against the State of New York in 1953, urged the postponement of depositions, the withholding of documents, the removal of documents beyond to plaintiff's subpoena power and the payment by the United States of one-half of the $18,000 settlement, to keep the Army's role in Mr. Blauer's death secret;

—an Assistant Attorney General of New York met with a judge of the New York Court of Claims *ex parte* prior to a hearing on the $18,000 settlement which was scheduled before the Court of Claims, to tell the judge the true underlying facts and to impress on the judge the need for this information to be kept secret.

Faced with these and other facts uncovered by Ms. Barrett only after the Army's 1975 disclosures, the Second

Circuit concluded that "this evidence of intentional concealment of material facts" warranted "the application of the diligence-discovery rule." The diligence-discovery rule, of course, is well-established federal law. *See United States* v. *Kubrick*, 444 U.S. 111 (1979).

The petitioner here, James Cattell, administered the Army's drug program at the New York Psychiatric Institute. He was also the author of the medical report on Mr. Blauer's death which the Second Circuit found created a "misimpression" that Blauer's death was due at least in part to heart disease, rather than due solely to the drug injection. Cattell stated in the U.S. Army Inspector General's Report that the material he injected could have been "dog piss," for all he knew. In the face of such evidence, Cattell's contention that he "had no involvement in the alleged post-death cover-up" (Pet. at 23) is disingenuous at best. Cattell has not yet been deposed in this action, due to restrictions placed on discovery until the statute of limitations issue was resolved. Thus, additional evidence of his involvement and the involvement of others may still be developed.

Significantly, Cattell is the only defendant who has filed a Petition for a writ of certiorari from the Second Circuit's decision at this juncture. All of the other defendants evidently agree that the case should be sent back to the District Court for further pre-trial proceedings, and for trial. In particular, the Solicitor General has declined to seek a writ of certiorari on behalf of the defendants whom the Attorney General represents.

ARGUMENT

I.

THE PETITION IS PREMATURE.

Because Cattell is not asking this Court to review a final judgment following trial, the petition is premature. Cattell asks this Court to review a decision of the Second Circuit reversing a grant of summary judgment to the defendants by the District Court. The effect of the Second Circuit's ruling is to deny summary judgment to Cattell, but to permit Cattell to raise his statute of limitations arguments and all of his other arguments again when the case is tried. As the Second Circuit said, "[w]e express no opinion as to the appropriate disposition of these issues at trial." Cattell therefore can raise with the ultimate trier of fact in the District Court the same issues which he seeks now to present to this Court. Furthermore, after final judgment is entered, Cattell will still have the opportunity to raise these same issues with this Court, together with any other questions raised between now and the end of the trial of this case. The petition is therefore premature, because these issues should be fully explored by the lower courts before they are brought to this Court. Petitioner seeks piecemeal review, which is a waste of the scarce time and resources of this Court.

For these reasons, this Court does not ordinarily review a non-final judgment. There is no reason to vary that rule in this case.

II.

THERE IS NO CONFLICT BETWEEN THE CIRCUITS.

As is evident from the Petition, Cattell has not suggested that there is any conflict between the various circuits on any of the questions which he now raises.

Therefore, there is no need for this Court to review this case to settle divergences in federal decisional law.

III.

THE PETITIONER HAS NOT PRESENTED ANY IMPORTANT ISSUE OF FEDERAL LAW WHICH WARRANTS RESOLUTION BY THIS COURT.

Cattell has not raised any novel or important questions which now warrant resolution by this Court. In the present procedural posture of this case, the real issue presented by Cattell's Petition is whether the Second Circuit correctly concluded that Ms. Barrett has made out a sufficient case to go to trial on the applicability of the "diligence-discovery" rule and on other issues. These questions involve the application of well-established rules to particular record facts—which is not the function of this Court. This Court is not the proper forum to review the question of whether Barrett has made out a triable issue of fact on the question of Cattell's role in the concealment of the true cause of Mr. Blauer's death. (Pet. at 23-25) It is the function of the lower federal courts to take rules which have been fashioned by this Court, such as the diligence-discovery rule (*see United States* v. *Kubrick*, 444 U.S. 111 (1979)), and to apply those rules to a given set of facts. A Petition for a writ of certiorari which asks this Court to undertake that function is improper and should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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